In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1663

MICHAEL GARDNER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-6631

ANTHONY SANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner Sano was convicted of eight counts of stock fraud by use of the mails, in violation of 15 U.S.C. 78j(b) and Rule 10(b)-5 of the Securities and Exchange Commission, and petitioner Gardner was convicted of conspiring to commit stock fraud, in viola-

tion of 18 U.S.C. 371. Sano was sentenced to a term of three years' imprisonment and Gardner was sentenced to a term of imprisonment of a year and a day. The court of appeals affirmed (Pet. App.).[1]

Petitioner Gardner contends (1) that the proof at trial established multiple conspiracies rather than the single conspiracy charged in the indictment, (2) that a perjury count charged against a co-defendant was improperly joined with the conspiracy and substantive counts against Gardner, and (3) that Gardner's prosecution constituted an abuse of prosecutorial discretion. Petitioner Sano contends that the prosecution did not establish that the mails had in fact been used in this case.

The evidence at trial established generally that petitioners and others conspired to manipulate the price of Vendotronics Corporation stock through a variety of fraudulent devices. These manipulations were financed by co-defendant Ronald Kazdin, the President of Vendotronics, and supervised by Fred Goodman, a stock broker and an unindicted co-conspirator. Goodman hired petitioners, among others, to tout the stock in order to generate a substantial artificial demand on the over-the-counter market.

In particular, the evidence showed that in 1968, on Goodman's advice, Kazdin's father purchased for

[1] Petitioners were indicted with nine other co-defendants: Anthony Soldano, Ronald Kazdin, Murray Levine, Leonard Kozman, Anthony DiBennedetto, Steven J. Feiffer, Fred Hesse, Louis Kaye, and James Morse. Of those co-defendants, all but Kozman and Soldano pled guilty before trial. Soldano was acquitted on all counts but Kozman was convicted of both conspiracy and substantive offenses.

his son a controlling interest in Vendotronics, then an inactive, publicly held corporate shell. The purchase price was $20,000 for 180,000 shares (Tr. 110–120). Goodman was given 40,000 shares as a finder's fee

In 1968 co-defendant Kazdin made 20,000 shares of Vendotronics available for public sale and agreed to finance Goodman's effort to create an artificial demand for the stock by bribing brokers to tout the stock. Goodman then met with petitioner Sano, a stock promoter, who agreed to tout the stock for 10 percent of the dollar value of all purchases he generated. Sano was given a $2,500 down payment for his efforts (Tr. 144–147). To generate sales, Sano touted the stock himself and also bribed other brokers to do likewise (Tr. 492–493). In a matter of months, the stock began to be actively traded (Tr. 396–410). After receiving another $5,000 from Goodman, petitioner Sano was able to manipulate the stock to $6.00 a share principally by bribing brokers to buy the stock for their customers (Tr. 747–758). This pattern continued throughout 1969. During this time Goodman also engaged Leonard Kozman, a Cleveland stockbroker, to tout the stock. Kozman was promised $1.00 for each share of stock bought by his customers. Similar deals were made with New York brokers (Tr. 1027–1029).

In April 1970, in a continuing effort to manipulate Vendotronics so that he could sell off his 40,000 shares, Goodman hired Fred Hesse, a stock promoter, who in turn recruited petitioner Gardner. Goodman agreed to pay Hesse and Gardner $3.00 per share for each share they were responsible for selling. They were

also promised an additional $10,000 if they sold 10,000 shares of stock (Tr. 205–215). To promote buying in Vendotronics, petitioner Gardner bribed other brokers and also purchased the stock himself through an inactive corporation (Tr. 1315–1324). On several occasions Gardner and Hesse gave bad checks to cover their stock purchases. For their efforts, Hesse and Gardner were paid $50,000 by Goodman. The last payment of $10,000 was made in May 1970.

1. Petitioner Gardner's contention that the indictment charged one conspiracy while the proof showed multiple conspiracies is insubstantial. The effort to manipulate the price of Vendotronics stock by Kazdin and Goodman was a unitary and continuous effort with a single purpose—to raise the price of Vendotronics so that Goodman and Kazdin could sell off their shares at a substantial profit. This conspiracy began in March 1969 and continued until May 1970. The fact that different stock promoters were used during the conspiracy does not change its character to one of separate conspiracies. Like the conspiracy in *Blumenthal* v. *United States*, 332 U.S. 539, 559, it was "a single conspiracy of which the several agreements were essential and integral steps * * *." Petitioner Gardner joined in the conspiracy with knowledge of its specific purpose and with intent to accomplish the same common goal. The fact that he may have been unaware of the participation of others is no basis for reversing his conviction. *Blumenthal* v. *United States, supra,* 332 U.S. at 558; *United States* v.

Projansky, 465 F. 2d 123, 135 (C.A. 2), certiorari denied 409 U.S. 1006.[2]

2. Petitioner Gardner's contention that it was improper to join the perjury count of co-defendant Leonard Kozman with the conspiracy and substantive counts charged against Kozman and himself is without merit.

Rule 8(b), Fed. R. Crim. P., allows joinder of "* * * [t]wo or more defendants * * * if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The purpose of the rule is to promote economy and efficiency so as to avoid multiple trials where the objective can be accomplished without substantial prejudice to the rights of the defendants. *Bruton* v. *United States*, 391 U.S. 123, 131, n. 6. The rule requires only that the common activity of the defendants constitute a substantial portion of the proof of the joined charges. *United States* v. *Roselli*, 432 F. 2d 879, 899 (C.A. 9), certiorari denied, 401 U.S. 924.

In the instant case, the perjury count alleged false testimony by Kozman in the grand jury concerning both his efforts to induce customers to purchase Vendotronics and the manner by which Goodman had paid him for his services in manipulating the price

[2] *Kotteakos* v. *United States*, 328 U.S. 750, relied on by petitioner Gardner, is inapposite. In *Kotteakos* there were 32 defendants and at least eight distinct conspiracies connected only by the prominence of a single figure. Such is not the case here.

of the stock. In short, the alleged perjury was committed to conceal the illegal conspiracy. And proof of the perjury count required substantially the same evidence as was required to establish Kozman's and petitioner Gardner's guilt on the conspiracy count. See, *e.g.*, *United States* v. *Isaacs*, 493 F. 2d 1124 (C.A. 7), certiorari denied June 17, 1974, No. 73–1651.

3. Petitioner Gardner's contention that his mere indictment constituted an abuse of prosecutorial discretion is also without merit. The basis for that contention is that other persons, alleged by Gardner to be equally culpable, were not indicted. But even assuming that to be true, it is well understood that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler* v. *Boles*, 368 U.S. 448, 456. Gardner was indicted with ten others for his part in this stock manipulation conspiracy. His unsupported assertion that others should also have been indicted, without any showing by him "that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification" (*Oyler* v. *Boles*, *supra*, 468 U.S. at 456) does not state an adequate ground for dismissal of his indictment.

4. Petitioner Sano contends that the government, in proving that certain brokerage firms' invariable custom was to mail stock purchase confirmations, failed to establish that those firms had actually mailed the confirmations in question at trial and therefore failed to prove the jurisdictional element of the substantive offense beyond a reasonable doubt. But proof of cus-

tom and usage, in the absence of direct evidence concerning specific mailings, constitutes an adequate basis for consideration of the issue by the jury. See *Smith* v. *United States*, 343 F. 2d 539, 544 (C.A. 5); *United States* v. *Vandersee*, 279 F. 2d 176, 181 (C.A. 3), certiorari denied, 364 U.S. 943; *Bolen* v. *United States*, 303 F. 2d 870, 875 (C.A. 9); *United States* v. *Shavin*, 287 F. 2d 647, 652 (C.A. 7); *United States* v. *Fassoulis*, 445 F. 2d 13, 17 (C.A. 2), certiorari denied, 404 U.S. 858. The appellate decisions on which Sano relies—*Leasing Associates, Inc.* v. *Slaughter & Sons, Inc.*, 450 F. 2d 174 (C.A. 8), *Masters* v. *United States*, 229 F. 2d 677 (C.A. 6), and *United States* v. *Barnette*, 91 F. 2d 10 (C.A. 5)—were civil cases holding that proof of a custom of mailing notices does not establish as a matter of law that the notices have been received. Those decisions are not in conflict with the decision below.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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